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No. 87-459

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

NATIONAL IRANIAN OIL COMPANY,
Petitioner,

v.

ASHLAND OIL, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

This case arises in the context of an international commercial dispute which is—or has been—the subject of litigation or arbitration in the United States, Bermuda, England and Iran. Petitioner, an instrumentality of the Government of Iran, filed a breach of contract suit for damages in federal district court in Mississippi. After respondent filed counterclaims and discovery requests, petitioner then sought to compel arbitration in Mississippi pursuant to an agreement it had drafted which provides for arbitration in Iran. There is no dispute that the district court lacks the statutory power to compel arbitration at the location specified in the agreement and also that there has been no agreement to arbitrate anywhere else, including Mississippi. Notwithstanding its present insistence on arbitration in the United States, petitioner is also attempting to pursue litigation of the same dispute in Bermuda.

The question presented is:

> Whether, in light of the unusual facts and procedural circumstances of this case, the court of appeals erred in affirming the decision of the district court which refused to compel arbitration in Mississippi.

PARTIES TO THE PROCEEDING

The parties to the proceedings below were petitioner, National Iranian Oil Company, and respondent, Ashland Oil, Inc.*

* Pursuant to Rule 28.1 of this Court, Ashland Oil, Inc. states that, with the exception of Melamine Chemicals, Inc., it has no subsidiaries or affiliates that have outstanding securities that are publicly traded.

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RESPONDENT'S BRIEF IN OPPOSITION

Ashland Oil, Inc. ("Ashland") files this Brief in Opposition to the Petition for a Writ of Certiorari filed by petitioner, National Iranian Oil Company ("NIOC").

OPINIONS BELOW

The opinion of the court of appeals (App. 4a-21a) is reported at 817 F.2d 326 (1987).[1] The opinion of the

[1] As used herein, "App." refers to the Appendix to the Petition, "Pet." refers to the Petition, and "R." refers to the record on appeal. For the convenience of the Court, a copy of the record on appeal and other material filed with the courts below and referred to in this Opposition has been lodged with the Clerk of the Court.

United States District Court for the Southern District of Mississippi (App. 22a-26a) is reported at 641 F. Supp. 211 (1986).

COUNTERSTATEMENT OF THE CASE

The underlying dispute between the parties concerns NIOC's failure to honor a long-term crude oil supply agreement and Ashland's [2] consequent refusal to pay for several shipments of crude oil by way of set-off. This dispute is (or has been) the subject of litigation or arbitration in the United States, Bermuda, England and Iran. The issue before the lower courts was whether, under the circumstances of this case, Section 4 of the Federal Arbitration Act, which provides that a court may compel arbitration (i) "within [its] district," (ii) "in accordance with the terms of the agreement," requires the district court to compel arbitration in Mississippi pursuant to an agreement drafted by NIOC that provides for arbitration in Iran.

A. The Dispute Between the Parties

From 1973 to October 1978, NIOC was a primary source of crude oil for Ashland pursuant to long-term contracts. (App. 5a.) In late 1978 after the Islamic revolution began, NIOC suspended crude oil deliveries to Ashland under these contracts, forcing Ashland to purchase more expensive crude oil on the world spot market.

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[2] In this brief, references to Ashland include its Bermuda subsidiaries which acted as its agents in dealings with NIOC.

As indicated in the Petition, Ashland has conceded, both in this case and in related litigation brought by NIOC in Bermuda, that it is in privity of contract with NIOC on the agreements and transactions involved in this dispute. Prior to the decision below, Ashland had offered to concede this point as part of a comprehensive proposal to stay the Bermuda litigation in favor of proceedings in the United States. (Exhibit to Ashland's July 2, 1987 Memorandum in Opposition to Appellant's Motion to Stay Issuance of Mandate Pending Application for Certiorari.) NIOC rejected this proposal.

(R. 64-65.) In early 1979, NIOC offered to resume long-term sales to Ashland on the condition that several spot cargoes of crude oil were purchased at premium prices. (R. 67-68.) After the spot cargoes had, in fact, been purchased, Ashland and NIOC signed a Heads of Agreement on March 11, 1979. (R. 71.) The Heads of Agreement provided for NIOC to supply Ashland with 150,000 barrels of crude oil per day from April 1, 1979 through December 31, 1981. (*Id.*)

One month later, on April 10, 1979, at a meeting with Ashland representatives at NIOC's offices in Tehran, NIOC repudiated the Heads of Agreement. (App. 23a.) NIOC insisted that Ashland's representatives sign a much less favorable form of contract, "Contract No. 106," covering a much shorter period of time (9 versus 33 months) and a substantially reduced daily quantity of oil (115,000 versus 150,000 barrels per day). (App. 22a-23a.) NIOC also insisted that Ashland representatives sign a "side letter," which purported to terminate the Heads of Agreement as well as earlier contracts which had been suspended in late 1978. In order to mitigate damages and secure some performance by NIOC, Ashland's representatives signed both the side letter and Contract No. 106 under duress. (R. 75-76.)

Article X of Contract No. 106 provides for arbitration of "[a]ny dispute between the parties arising out of this Contract." (App. 39a.) Article X also provides that "[t]he seat of arbitration shall be in Tehran, unless otherwise agreed by the parties," that Iranian law governs the interpretation of any arbitral award, and that, if appointment of an arbitrator is necessary, "the interested party may request the President of the Appeal Court of Tehran" to make the appointment. (*Id.*)

Throughout 1979, NIOC repeatedly breached Contract No. 106. NIOC progressively reduced the supply of crude oil (from 115,000 to 95,000 barrels per day) while requiring the purchase of several additional spot cargoes

of crude oil at prices ($36 to $45 per barrel) double those under Contract No. 106, as a condition for continued supply under long-term contract. (R. 76-77, 80.)

Following the seizure of the hostages at the United States Embassy in Tehran on November 4, 1979, NIOC cancelled further deliveries of crude oil under Contract No. 106. (App. 23a.) At that time, several shipments of crude oil, including spot cargoes not under Contract No. 106, were in route to Ashland. (*Id.*) When NIOC failed to present the proper documentation necessary to secure payment for these cargoes under previously arranged letters of credit with various banks, NIOC sought payment directly from Ashland. (*Id.*) Since damages from NIOC's breaches of the Heads of Agreement and Contract No. 106 exceeded the amount of the invoices on these shipments, Ashland did not pay them, and, by written notice dated February 20, 1980, offset its damages against NIOC's charges on these shipments. (*Id.*)

B. Other Proceedings Involving This Dispute

Prior to, and concurrent with, NIOC's attempt to compel arbitration in federal court, this dispute has been the subject of litigation and/or arbitration in several jurisdictions. NIOC has attempted to gain selective advantage by the very "tactical jockeying for position" of which it accuses Ashland.

1. *Iran.* In November 1983, NIOC sought to commence arbitration in Tehran under Contract No. 106 by sending Ashland a "Notice of Arbitration" with respect to $282 million in invoiced oil deliveries.[3] (R. 19.) Ash-

[3] In November 1980, Ashland filed suit against NIOC in the United States District Court for the Southern District of New York for breach of both the Heads of Agreement and Contract No. 106. (R. 181-94.) This action was suspended pursuant to Executive Order and regulations of the Office of Foreign Assets Control of the Department of Treasury which implemented the Algerian Accords, adhered to by the United States to gain release of the American hostages from Iran. *See* n. 7, *infra*.

land declined to participate in any such arbitration, citing a number of defects and defenses to NIOC's demand, as well as the political and legal circumstances and unsafe conditions prevailing in Iran. (R. 171-78.) Subsequently, in May 1984, NIOC began judicial proceedings in the Public Court of Tehran to appoint an arbitrator for Ashland. (R. 196-200.) The Public Court denied NIOC's application. (R. 176.)

2. *England and Bermuda.* Thereafter, in the fall of 1985, NIOC filed but did not serve essentially identical suits against Ashland in both England and Bermuda, seeking damages of $89 million for breach of Contract No. 106 and $193 million for breach of other alleged contracts, *i.e.*, the spot sales.[4] (R. 201-09.) Neither suit seeks to compel arbitration.

After obtaining a stay of proceedings in the district court pending the appeal below,[5] NIOC commenced active litigation in Bermuda in September 1986 by serving the complaint on Ashland. NIOC refused to enter into a standstill agreement and vigorously opposed all efforts by Ashland to stay the duplicative Bermuda proceedings in favor of the proceedings NIOC had begun in Mississippi. On July 16, 1987, after a three and one-half week hearing, the Bermuda court directed that the Bermuda proceedings be stayed in favor of those pending in the Mississippi district court, noting that it could see "no real or substantial judicial advantage to NIOC, apart from

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[4] According to NIOC, both the Bermuda and English actions are "protective suits," filed in order "to toll the statutes of limitations." (NIOC's April 3, 1986 Memorandum in Opposition to Ashland's Motion to Dismiss at 2 & n.1, 10, 11.)

[5] In seeking a stay from the court of appeals, NIOC represented that "litigation is the very antithesis of arbitration" (NIOC's August 5, 1986 Reply Memorandum in Support of Motion for a Stay at 2) and that its right to arbitrate "will be irreparably impaired" by continued litigation (NIOC's July 29, 1986 Memorandum in Support of Motion for a Stay of Proceedings at 12).

being able to play off one set of proceedings against the other. . . ." (App. 46a, 69a.) NIOC has appealed this decision.

C. The Proceedings Below

On November 18, 1985, NIOC filed this case against Ashland in the United States District Court for the Southern District of Mississippi.[6] Despite NIOC's current position that it does not want to litigate but only seeks to arbitrate in the United States, NIOC did not file a simple petition to compel arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. § 4 (1982). Instead, NIOC filed a four-count complaint. The first three counts seek recovery of $282 million in damages for breach of contract, for unjust enrichment, and for the price of goods sold and delivered. (R. 3-5.)

Although the last count in the complaint seeks an order compelling arbitration, NIOC did not initially seek to compel Ashland to arbitrate. It was only after Ashland filed its Amended Answer and Counterclaim (R. 52-86) and served discovery requests on NIOC (R. 89-118), that NIOC filed its application to compel arbitration in Mississippi[7] and to appoint an arbitrator on Ashland's be-

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[6] Mississippi is one of only a few states with a six-year rather than a four-year statute of limitations on contract claims. NIOC selected Mississippi as a forum and timed the filing of its complaint so as to contend that under the Mississippi statute of limitations, NIOC may pursue its claims against Ashland but that Ashland's counterclaims against NIOC accrued earlier and are time barred as a result. (App. 18a.)

[7] Although NIOC's application seeks to refer all claims and counterclaims in the case to arbitration (R. 149), it is NIOC's position that Ashland's counterclaims have already been extinguished and cannot be raised either in litigation or in arbitration. (Brief of Appellant at 12 n.6.) According to NIOC, Ashland's counterclaims were extinguished by operation of the Algerian Accords when Ashland did not file them with the Iran-United States Claims Tribunal.

half (the relief denied it by the Iranian courts). Ashland responded and moved to dismiss on a number of grounds, including the district court's lack of power to compel arbitration within its district pursuant to an agreement to arbitrate elsewhere. (R. 166, 171.)

1. *The Decision of the District Court*

On June 27, 1986, the district court denied NIOC's application to compel arbitration. The district court held that 9 U.S.C. § 4 permits a district court to compel arbitration (1) only in its judicial district and (2) only in accordance with the terms of the agreement to arbitrate (App. 24a-25a) and that, under the circumstances, it lacked the power to compel arbitration in Mississippi for the "convenience" of the parties.[8] (App. 26a.) The district court did not reach any of the other issues raised in opposition to NIOC's application. Subsequently, however, the district court found that the spot sales, which comprise the bulk of NIOC's claims, were not subject to any agreement to arbitrate. (R. 281.)

(*Id.*) However, Executive Order No. 12294, 46 Fed. Reg. 14,111 (1981) and companion regulations of the Treasury Department, 31 C.F.R. § 535.222 (1986), which implement the Accords, expressly provide for such counterclaims. NIOC's motion to dismiss Ashland's counterclaims is pending before the district court.

[8] The district court also ruled that it lacked the power to compel arbitration "at any place specified in the agreement" pursuant to 9 U.S.C. § 206 (1982) because Iran, the site specified in the arbitration agreement, is not a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517 (1970), and 9 U.S.C. §§ 201-08 (1982) ("Convention"). (App. 24a.) The Convention has now been adhered to by 71 countries, including most of the world's major trading nations. On the basis of reciprocity, Congress expressly limited the benefits of the United States' adherence to the Convention to arbitration in another signatory country. NIOC did not appeal this aspect of the district court's ruling.

2. *The Decision of the Court of Appeals*

NIOC appealed. The sole issue NIOC presented to the court of appeals was "[w]hether the United States Arbitration Act, 9 U.S.C. § 1, et seq., empowers the District Court to order arbitration in the district where it sits when the arbitration clause sites the proceeding elsewhere . . . ." (Brief of Appellant at 1.)

Contrary to NIOC's suggestion, the court of appeals did not treat NIOC's claims cavalierly. It did not summarily affirm the district court's opinion. Instead, on May 22, 1987, the court issued a detailed, well-reasoned opinion which considered all of NIOC's arguments and affirmed the district court on several alternate grounds.

The court of appeals expressly declined to hold that Section 4 of the Arbitration Act absolutely prohibits a district court from compelling arbitration within its district when the agreement to arbitrate specifies a different location. "[W]e have not taken such a literal approach to the two part mandate of section 4." (App. 11a.) Instead, the court of appeals *agreed* with NIOC that "there may be some cases in which district courts are empowered to compel arbitration notwithstanding the parties' contractually established forum . . . ." (App. 12a.)

The court of appeals concluded, however, that "this is not such a case." (App. 12a.) It reached this conclusion after considering, and properly rejecting, NIOC's arguments that the circumstances of this case and the strong federal policy in favor of arbitration require compulsory arbitration in a forum (Mississippi) different from the one specified in the agreement it drafted.

a. The court first addressed NIOC's contention that it had waived its right to the benefit of the Iranian forum-selection clause by seeking to compel arbitration in Mississippi. The court correctly found that NIOC had

not waived any such right because, as NIOC itself conceded (App. 13a), it had no right, under either Section 4 of the Arbitration Act or the Convention, to compel arbitration in Tehran. Moreover, NIOC had already sought—and might still seek—to arbitrate the dispute in Iran. (*Id.*)

b. The court next considered whether the "inconvenience" of participating in an arbitration in Tehran required it to sever the forum-selection clause and compel Ashland to perform what NIOC argued was the essential term of the agreement, *i.e.*, arbitration. The court properly held that this was not required, basing its conclusion on at least four alternate and independent grounds, each of which was limited to the facts of the case before it.

(i) The court first concluded that NIOC was not entitled to disregard the forum-selection clause on the basis of impossibility or commercial impracticability. NIOC had reason to know at the time it drafted the agreement that Tehran might become an "inconvenient" forum (two months earlier in February 1979 the United States Embassy was attacked and 100 hostages were briefly taken). (App. 16a.)

(ii) In addition, the court found that NIOC was not entitled to disregard the forum-selection clause because, as a part of the Iranian government, NIOC shared responsibility for the chain of events which made it impractical or impossible to arbitrate in Tehran. (App. 17a.)

(iii) The court also concluded that NIOC had not shown that the clause specifying arbitration in Tehran (where NIOC's offices are located) was severable from the rest of the arbitration provision in NIOC's standard form contract. The court noted that the agreement drafted by NIOC provided that Iranian law governed the interpretation and rendition of any award, and that

the President of the Appeal Court of Tehran could "appoint the second arbitrator or the third arbitrator as the case may be." (App. 18a.)

(iv) Finally, the court found that there was no reason to conclude that the parties contemplated Mississippi as an alternate arbitral site. The court observed that NIOC selected Mississippi as the forum below because of Mississippi's favorable limitations period. (App. 18a.) The court also stressed that the parties could never have compelled arbitration at the designated site (App. 19a); that, had NIOC wanted an arbitration agreement that was specifically enforceable by the United States courts, it could have designated a forum in any of the many countries that are signatories to the Convention or any of the states where Ashland does business (*id.*); and, finally, that the court could not simply rewrite the agreement of the parties after the fact (*id.*).

NIOC sought rehearing *en banc* on the same grounds contained in its petition here. Rehearing was denied on June 22, 1987, with no judge on the full court requesting a vote on rehearing *en banc*. *National Iranian Oil Co. v. Ashland Oil, Inc.*, 823 F.2d 552 (5th Cir. 1987). Thereafter, NIOC sought a stay of the court's mandate pending the filing of a petition for a writ of certiorari, noting that the issue presented here is one "of first impression under the Arbitration Act." (Motion to Stay Issuance of the Mandate at 8.) On July 7, 1987, the motion to stay was denied.

REASONS FOR DENYING CERTIORARI

The petition should be denied because the holding of the court of appeals is correct, does not conflict with the holdings of this Court or any other court of appeals and does not present an important question for resolution by this Court.

I. THE PETITION DOES NOT PRESENT ANY ISSUE OF GENERAL PUBLIC IMPORTANCE

A. The Decision Below Is Limited to the Procedural and Factual Circumstances of This Case

The decision of the court of appeals is based on the meaning and effect of the specific terms of the arbitration agreement drafted by petitioner and on the application of accepted legal principles to the specific procedural and factual circumstances of this case. Because it is unlikely that the same issues will arise in the future, the decision does not present issues of general public importance beyond the interests of the parties and is therefore not appropriate for this Court's certiorari review. *See, e.g., Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923); *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955) (issues must be "beyond the academic or the episodic").

In an effort to secure Supreme Court review, petitioner ignores the narrow basis of the court of appeals' decision, suggesting that the decision establishes broad new standards for enforcement of arbitration agreements with potentially wide-ranging repercussions. Petitioner's fundamental argument is based on the mistaken premise that the court of appeals held that a district court cannot compel arbitration within its district pursuant to an agreement which specifies arbitration at a different location.[9] (Pet. at 5, 7, 11.) That is simply not what the court held. As the court of appeals expressly stated,

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[9] Petitioner also seeks review by this Court with respect to one issue that was not even discussed in the decision below (the propriety of a stay, *see* n.12, *infra*) and another issue that was, at most, one of several alternate grounds for concluding that arbitration need not be compelled here (NIOC's responsibility, as an Iranian governmental entity, for the events making its impossible to arbitrate in Iran, *see* n.10, *infra*).

"we have not taken such a literal approach to the two part mandate of section 4." (App. 11a.) Instead, the court held that "there may be some cases in which district courts are empowered to compel arbitration notwithstanding the parties' contractually established forum or outside of the district in which the courts sit." (App. 12a.)

The essence of the decision below is the court's very narrow holding that "*this* is not such a case." (*Id.*; emphasis added.) This holding was based on the court's consideration of the specific facts and circumstances in the case before it. The court first concluded that petitioner had not waived its right to rely on the contractually designated forum because, as petitioner itself conceded, it had no right under either the Arbitration Act or the Convention to compel arbitration in Tehran in the first place, and because petitioner had already attempted, and might still attempt, to arbitrate these disputes in Tehran.

The court also concluded that even if NIOC had waived its right to arbitrate in Tehran, the forum-selection clause in the arbitration agreement could not be disregarded on grounds of "inconvenience" or commercial impracticability since: (i) NIOC had reason to know when it drafted the arbitration agreement that Tehran was or might become an "inconvenient" forum; (ii) NIOC, as an Iranian governmental entity, bears responsibility for the chain of events making it impossible to arbitrate in Tehran;[10] (iii) the forum-selection clause was

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[10] Petitioner argues at length that review by this Court is warranted due to an alleged conflict between this limited aspect of the decision below and *First National City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983), and other courts of appeals' decisions. (Pet. at i, 5, 12-16.) There is no conflict. The decisions cited by petitioner deal with the liability of foreign states or state-owned enterprises and not whether a state-owned enterprise should be able to disregard provisions in agreements made "impracticable" by the government of which it is a part. Moreover, while

not severable from the rest of the agreement to arbitrate because of the close connection between the location specified and other aspects of the arbitration, *i.e.*, governing law and appointment of arbitrators, and finally, (iv) there was no indication that Mississippi was ever contemplated by either party as an alternate arbitral forum.

Since these narrowly based rulings are limited to the particular facts of this case and not likely to arise in the future, they do not present any significant issues that require this Court's consideration.

B. The Decision Below Does Not Threaten to Undermine Commercial Relations Between the United States and Its Trading Partners

Even if the decision below were not limited to the facts of this case, it would not have the dire consequences

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First National City Bank held that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such," 462 U.S. at 626-27, it also held that the separateness of the instrumentality may be disregarded when it would be inequitable not to do so. 462 U.S. at 630, 632. That is the case here, when NIOC affirmatively relies on its status as an Iranian governmental entity or as part of "Iran," as defined in the Algerian Accords, (i) to invoke the jurisdiction of the United States courts (R. 1), (ii) to deny Ashland's right to a jury trial in the case below (R. 128), (iii) to assert that Ashland's counterclaims cannot be litigated *or* arbitrated because they are committed to the exclusive jurisdiction of the Iran-United States Claims Tribunal (Brief of Appellant at 12 n.6), and (iv) to assert immunity from Ashland's counterclaims (R. 120).

Even if there was a theoretical conflict between *First National City Bank* and this aspect of the decision below, certiorari would be inappropriate. The alleged conflict is not an essential aspect of the decision but is only one of several alternate and independent bases for the court's conclusion that the forum-selection clause could not be ignored on grounds of "inconvenience," "impossibility" or "commercial impracticability." *Smith v. Butler*, 366 U.S. 161 (1961); *McCarthy v. Bruner*, 323 U.S. 673 (1944).

which petitioner hypothesizes. Petitioner suggests that, as a result of the decision below, United States companies will default *en masse* on agreements which provide for arbitration in countries that are not signatories to the Convention. According to petitioner, commercial disputes involving trade with these nations will inevitably result in litigation in national court systems.[11]

That is not the case. Even under a literal interpretation of Section 4 of the Arbitration Act (specifically eschewed by the court of appeals), United States companies are not free to ignore agreements to arbitrate in non-Convention countries. Whether or not the parties to such agreements can be compelled to arbitrate in the United States, the Arbitration Act provides a mechanism to prevent United States companies from initiating and pursuing litigation on arbitrable claims arising out of such agreements. As petitioner itself recognizes (Pet. at 17-18), if the other requirements of the Act are satisfied, Section 3 permits a district court to stay litigation on arbitrable claims.[12] *See also Practical Concepts, Inc. v. Republic of Bolivia*, 811 F.2d 1543, 1545 n.2, 1552 (D.C.

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[11] Petitioner points to the volume of trade between the United States and non-Convention countries as an indication of the significance of the decision below. (Pet. at 6.) Petitioner provides no indication, however, of the extent to which such trade consists of contracts containing agreements to arbitrate in non-Convention countries. Moreover, as the court of appeals recognized, residents of non-Convention countries can insure their ability to compel arbitration through the United States courts by selecting a site within a Convention country. (App. 19a.)

[12] Petitioner contends that the court of appeals' decision is wrong and conflicts with cases interpreting Section 3 because it did not stay the litigation below. (Pet. at 17-18.) There is no basis for Supreme Court review on this point. The decision below does not even discuss the issue of a stay. This is not surprising because NIOC did not raise this issue on appeal. (Brief of Appellant at 1.) Moreover, NIOC cannot stay the litigation below on the basis of an agreement to arbitrate when *it* is the party that initiated the litigation and when *it* actively seeks to pursue duplicative litigation in Bermuda.

Cir. 1987) (as Department of Justice apparently urged as *amicus*, default judgment vacated to permit assertion of, *inter alia*, arbitration defense) (*cited* in Pet. at 10 n.9).

Nor is it likely that United States companies will simply ignore demands to arbitrate in non-Convention fora. Arbitration may take place at the designated location in the absence of one of the parties. Assuming that the arbitration were otherwise proper, it may be possible to enforce a resulting award in the United States by having the award confirmed by the courts of the country in which the arbitration took place. *See, e.g., Hilton v. Guyot*, 159 U.S. 113, 202-03 (1895) (enforcing foreign judgment procured according to principles of fairness and due process); *Island Territory of Curacao v. Solitron Devices, Inc.*, 489 F.2d 1313, 1318-19 n.6 (2d Cir. 1973), *cert. denied*, 416 U.S. 986 (1974) (enforcing foreign judgment which confirmed arbitral award); *Tahan v. Hodgson*, 662 F.2d 862 (D.C. Cir. 1981) (enforcing foreign default judgment). *See also* Sections 2 and 3 of Uniform Foreign Money-Judgments Recognition Act, 13 Uniform Laws Ann. 264-65 (1986).

There is no reason to assume that recourse to these enforcement procedures will result in the wholesale disregard of arbitration agreements by United States companies to the detriment of trade with non-Convention countries. Petitioner cites no instance in which any court has addressed the issue of whether to compel arbitration within the United States when the designated location for arbitration was in a non-Convention country. If this were a significant problem, the issue would have arisen long before now. However, as petitioner acknowledged below, the issue raised by the court of appeals' decision is one "of first impression under the Arbitration Act." (*See* p. 10, *supra.*) Under the circumstances, Supreme Court review is unnecessary and inappropriate.

II. THE DECISION BELOW WAS CORRECT AND DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT, ANY OTHER COURT OF APPEALS OR THE STRONG FEDERAL POLICY IN FAVOR OF ARBITRATION

The court of appeals carefully considered and rejected the arguments raised here by petitioner. The decision below was correct and fully in accordance with applicable Supreme Court and other precedent, as well as the policy of the Arbitration Act.

Petitioner contends that the decision below conflicts with the decisions of other courts of appeals which "uniformly recognize that strict adherence to the forum selection clause is not required." (Pet. at 11, citations omitted.) This contention ignores the court's actual holding, its explicit statement that "we have not taken such a literal approach to the two part mandate of section 4" (App. 11a), and its recognition that "there may be some cases in which district courts are empowered to compel arbitration notwithstanding the parties' contractually established forum or outside of the district in which the courts sit." (App. 12a.) Moreover, petitioner misconstrues the holdings of other courts of appeals, all of which are consistent with the decision below. *See, e.g., Snyder v. Smith*, 736 F.2d 409 (7th Cir.), *cert. denied*, 469 U.S. 1037 (1984) (vacating award entered in arbitration compelled at location contrary to forum specified in agreement); *Patten Sec. Corp. v. Diamond Greyhound & Genetics, Inc.*, 819 F.2d 400 (3d Cir. 1987) (clause specifying forum for litigation not inconsistent with obligation to arbitrate); *Continental Grain Co. v. Dant & Russell, Inc.*, 118 F.2d 967 (9th Cir. 1941) (party could not complain of arbitration within district in which it filed petition to compel).[13]

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[13] To the extent the court of appeals distinguished its approach to Section 4 from the holdings of some other courts confronted with different factual circumstances, it adopted petitioner's interpre-

Petitioner also contends that the decision below conflicts with decisions of this Court. Petitioner attempts to create such conflicts by citing general language from these decisions and ignoring the factual and procedural differences between the cases it cites (none of which involved the power of the district court to compel arbitration outside the forum specified by the parties) and the present case. *See, e.g., Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510, 516-17 (1974); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985). Accordingly, there are no conflicts of law which might support Supreme Court review. *See, e.g., Layne & Bowler Corp. v. Western Well Works*, 261 U.S. at 393.

Nor is there any conflict, as petitioner suggests, between the federal policy in favor of arbitration and the decision below. The court of appeals expressly recognized and endorsed the strong policy in favor of arbitration which it has repeatedly followed and reaffirmed in other cases. (App. 19a-20a.) It also recognized and endorsed the policy in favor of the arbitration of international commercial disputes. (App. 20a.)

It is not the case, as petitioner urges, that effectuation of federal arbitration policy requires specific enforcement of the arbitration agreement here. As both the court of appeals and this Court have recognized, there are limits to federal arbitration policy and not every dispute is subject to arbitration. (*Id.*) In this case it would have been perverse and contrary to arbitration policy for the district court to have granted NIOC's application. NIOC is not seeking to enforce the agreement it "bargained for," but instead is asking the district court to expand its (but not Ashland's) rights under the arbitration agreement. The agreement to arbitrate was never

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tation of the statute. If the court had adopted a "literal approach," the application to compel arbitration would have been denied without further analysis.

specifically enforceable by the United States courts at the site designated in the contract and neither NIOC nor Ashland could ever have compelled the other to arbitrate in Iran.[14] Nevertheless, NIOC claims the right to compel Ashland to arbitrate at a place not designated in the contract, *i.e.*, Mississippi (or any other place in the United States Ashland may be found). Ashland would have no reciprocal right, however, since NIOC is not found in the United States and other countries generally do not permit specific performance of arbitration agreements.

Compelling arbitration in Mississippi would also increase NIOC's rights to enforce any award in its favor, again without concomitant benefits to Ashland. Whereas an award in NIOC's favor in an Iranian arbitration would not be entitled to the confirmation and enforcement procedures available in the United States under either the Arbitration Act or the Convention, an award in NIOC's favor in a Mississippi arbitration would be entitled to such confirmation and enforcement in the United States under the Arbitration Act. In marked contrast, an award issued in Ashland's favor in a Mississippi arbitration could not be readily enforced against NIOC either in the United States (where NIOC is believed no longer to have assets), or in Iran (which is not a signatory to the Convention). In these circumstances, the relief sought by NIOC below is not required. *See, e.g., Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967) (purpose of the Arbitration Act "was to make arbitration agreements as enforceable as other contracts, but not more so").

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[14] As the court below found, NIOC could have made its agreement to arbitrate specifically enforceable by the United States courts by specifying an arbitration site in any of the countries which have adhered to the Convention. (App. 19a.) For obvious reasons of its own advantage and, perhaps, to preclude international enforcement of the arbitration clause in its standard form contracts, NIOC instead chose Iran as the site for arbitration.

CONCLUSION

For all of the foregoing reasons, the petition should be denied.

Respectfully submitted,

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